UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1472

MYLAN PHARMACEUTICALS, INCORPORATED,
a West Virginia Corporation,

Plaintiff-Appellee,

—v.—

AMERICAN CYANAMID COMPANY,
a Maine Corporation,

Defendant & Third-Party
Plaintiff-Appellant,

—v.—

STEPHEN MCKNIGHT, Personal Representative
of the Estate of Roy McKnight,

Third Party Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of West Virginia, at Clarksburg.
Frederick P. Stamp, Jr., District Judge.
(CA-90-121-C-S)

Argued: October 31, 1994 Decided: March 3, 1995

Before:

WILKINS and MICHAEL, *Circuit Judges,*
and PHILLIPS, *Senior Circuit Judge.*

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Rodney Orrin Thorson, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Washington, D.C., for Appellant. Andrew G. Fusco, FUSCO & NEWBRAUGH, Morgantown, West Virginia, for Appellees. ON BRIEF: Mark E. Herlihy, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Washington, D.C.; James F. Companion, SCHRADER, RECHT, BYRD, COMPANION & GURLEY, Wheeling, West Virginia, for Appellant. Thomas H. Newbraugh, Jeffrey A. Ray, FUSCO & NEWBRAUGH, Morgantown, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This case arises out of a dispute between Mylan Pharmaceuticals, Inc. (Mylan) and American Cyanamid Co. (Cyanamid) over the marketing of Maxzide[RM], a drug for the treatment of hypertension. Mylan sued Cyanamid on five counts, including breach of contract and breach of the implied covenant of good faith. Cyanamid brought four counterclaims, including a claim for defamation. Neither party recovered on any of its claims. The district court granted judgment as a matter of law on several claims, and the jury denied relief on the remainder. Cyanamid now appeals, and Mylan cross

appeals. We affirm on all but one issue. With respect to Cyanamid's defamation counterclaim, the district court erred in determining that Cyanamid was a limited purpose public figure. We therefore affirm in part, vacate in part, and remand for additional proceedings.

I.

Mylan developed Maxzide in the early 1980's as a more effective alternative to existing hypertension drugs. Maxzide was produced by a process called "parallel granulation," over which Mylan eventually received a patent. Because Mylan lacked the resources and experience to market Maxzide on a massive scale, it entered into an exclusive marketing agreement with Lederle Laboratories, a division of American Cyanamid.

Under the agreement Lederle agreed to purchase annually at least a specified minimum quantity of Maxzide at a specified price and to use its "best efforts consistent with its overall business objectives and commensurate with products of like nature and market potential, to advertise, promote, and market" Maxzide. The agreement was to last seventeen years, the length of Mylan's patent protection on the parallel granulation process. Lederle launched the product later that year, and it met with initial success.

This success, however, was short-lived. In 1987, several low priced generic substitutes entered the market. These products were as effective as Maxzide, but were produced by methods other than parallel granulation to avoid infringing Mylan's patent. Mylan brought lawsuits against the first few manufacturers but eventually settled. The presence of these generics in the market place reduced Maxzide's sales volume.

In 1988, Mylan introduced a lower strength version of Maxzide ("Maxzide-25"). Mylan and Lederle modified their earlier contract by means of a letter signed by Robert Saydah (vice president and general manager of Lederle) and Milan Puskar (president of Mylan). The letter, referred to by the par-

ties as the "Saydah Agreement", revised the original contract's pricing scheme and provided for Lederle's marketing of Maxzide-25.

In response to the onset of generic competition, Lederle decreased the resources that it devoted to marketing Maxzide. Mylan became dissatisfied with Lederle's performance and sued, claiming that Cyanamid had breached the best efforts clause of their contract. At about the same time Mylan's president and vice president stated publicly that Cyanamid was not living up to its part of the bargain.

Mylan's amended complaint made five claims against Cyanamid. First, it claimed that Cyanamid was improperly calculating its "net sales" for Maxzide, reducing the payments made to Mylan under the Saydah Agreement (Count I). Second, it claimed that Cyanamid had breached the "best efforts" provision of the agreement with respect to both Maxzide and Maxzide-25 (Counts II and III). Third, it claimed that Cyanamid had breached the implied covenant of good faith and fair dealing (Count IV). Finally, it claimed that Cyanamid failed to purchase the minimum quantity of Maxzide-25 required under the Saydah Agreement (Count V).

Cyanamid, in response, brought four counterclaims. First, it claimed that Mylan had fraudulently induced it to enter the agreement by misrepresenting the ability of its patent to stop generic competition (First Counterclaim). Second, it alleged that Mylan breached its contractual duty to protect Maxzide from generic competition (Second Counterclaim). Third, it claimed that Mylan and its chairman had defamed it (Third Counterclaim). Finally, it claimed that Mylan breached the contract by failing to obtain FDA-approved labeling (Fourth Counterclaim).

The district court disposed of several of these claims before trial, granting summary judgment for Cyanamid on Mylan's Counts I and V and for Mylan on Cyanamid's Third Counterclaim. At the close of the evidence the court granted judgment as a matter of law for Cyanamid on Mylan's Count IV. The jury returned a verdict on the remaining claims, denying

relief on all of them. Cyanamid now appeals and Mylan cross appeals.

II.

A. *Defamation counterclaim*

Cyanamid first claims that the district court erred in granting summary judgment for Mylan on Cyanamid's defamation counterclaim. Cyanamid based its counterclaim on the following statements by Patricia Sunseri (Mylan's vice president) and Steven McKnight (Mylan's president): (1) Sunseri's statement that Maxzide "languished while Lederle's sales force pushed other products," (2) McKnight's statement that "Lederle literally is not living up to their contract," (3) McKnight's statements that orders from Lederle were "nonexistent" and that Lederle was "digging its hole deeper and deeper," and (4) Sunseri's statement that Cyanamid responded to Mylan's lawsuit by cutting off all orders of Maxzide. The district court held that Cyanamid was a limited purpose public figure for the purposes of the above statements and that Cyanamid failed to show the requisite "actual malice" to hold Mylan liable for defamation.

The First Amendment provides less protection to a defamation plaintiff when that plaintiff is a public official or public figure rather than a private individual. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), the Supreme Court held that a public official may recover for a defamatory falsehood only if he can show that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard for its truth or falsity. The Court later extended this standard to "public figures" as well as public officials. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162-65 (1967).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that a person could be considered a public figure for a limited range of issues by voluntarily injecting himself into a particular public controversy. Such a "limited purpose

public figure" must show actual malice to recover for a defamatory statement relating to that controversy.

Here, the district court determined that Cyanamid became a limited purpose public figure by virtue of its launch and promotion of Maxzide, which were of "virtually unprecedented intensity." By voluntarily putting itself into the public eye, the court concluded, Cyanamid became a limited purpose public figure with regard to the controversy about its marketing of Maxzide.

We recently set out a two-part test for determining whether a defamation plaintiff is a limited purpose public figure. *See Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994). First, a "public controversy" must exist giving rise to the alleged defamation. Second, the nature and extent of the plaintiff's participation in that controversy must be sufficient to justify "public figure" status. *Id.* at 1553. We find that no public controversy exists here and that the district court erred in determining that Cyanamid is a limited purpose public figure.

In *Foretich* we adopted the District of Columbia Circuit's definition of "public controversy" as "a real dispute, the outcome of which affects the general public or some segment or it in an appreciable way." *Id.* at 1554 (quoting *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 US. 898 (1980)). We noted that "[e]ssentially private concerns or disagreements do not become public controversies simply because they attract attention." *Id.*

We considered the same issue in two cases prior to *Foretich*. In *National Found. for Cancer Research (NFCR) v. Council of Better Business Bureaus*, 705 F.2d 98 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983), the Council for Better Business Bureaus published a statement regarding the percentage of the NFCR's total income that was spent on program services. We decided that the NFCR was a limited purpose public figure for the purpose of this statement by virtue of its massive solicitation efforts, through which it "extolled its judicious use of donated funds in finding a cure for cancer." *Id.* at 101. In *Blue Ridge Bank v. Veribanc, Inc.*,

866 F.2d 681 (4th Cir. 1989), we held that a bank was not a limited purpose public figure for the purpose of a statement regarding its "corporate financial health." While the bank had engaged in an extensive promotional campaign, it had never raised its financial health as part of its promotional message. *Id.* at 687.

No public controversy exists in the present case. The conflict between Mylan and Cyanamid is a purely private contractual dispute about whether Cyanamid used its best efforts to market Maxzide. The allegedly defamatory statements dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public, such as Maxzide's effectiveness or whether Maxzide would continue to be distributed. The general public will not be affected by the outcome of this dispute.

This case is distinguishable from *NFCR*. In that case, NFCR's claim of judicious use of donated funds was part of the message of its solicitation campaign. Here, as in *Blue Ridge Bank*, the subject of dispute (the adequacy of Cyanamid's marketing efforts) was not part of Cyanamid's promotional message. Therefore, we conclude that the district court erred in finding that Cyanamid was a limited purpose public figure, and it thus erred in requiring Cyanamid to establish actual malice to maintain its claim of defamation. We vacate this finding and reinstate this counterclaim for additional proceedings under the standard applicable to a private individual.

B. *Evidentiary rulings*

Cyanamid claims that the district court erroneously admitted several pieces of evidence that prejudiced Cyanamid at trial. First, the court admitted letters from Milan Puskar (Mylan's president) to Cyanamid, in which Puskar expressed his opinion that Cyanamid was failing to meet its contractual obligations. Second, the court admitted a Lederle internal memorandum regarding complaints by Mylan prior to the lawsuit and deposition testimony by the memorandum's author explaining the memorandum. Third, the court admit-

ted testimony from Puskar about his frustration with the deteriorating relationship between the parties. Finally, the court admitted a copy of Cyanamid's 1991 Marketing Plan from which Mylan alleged Cyanamid had intentionally omitted pages. Much of this evidence was initially admitted to support the claim of bad faith, which was later disposed of as a matter of law.

We are satisfied that any error with respect to each of these items of evidence would be harmless. Any prejudice caused by each item would have been primarily with respect to the claims for breach of the best efforts provision—claims that were decided in Cyanamid's favor. At any rate, the prejudice would have been minimal in the context of a trial lasting well over a month and involving hundreds of pieces of documentary evidence. With regard to the letters in particular, the judge took steps to minimize their prejudice, including removing portions relevant only to the claim of bad faith and giving a limiting instruction that the letters should not themselves be regarded as proof of a claim. Therefore, Cyanamid suffered no substantial prejudice, and these rulings do not constitute reversible error. Fed. R Evid. 103(a).

C. *Effect of admission*

Cyanamid's final assertion of error is that the district court's jury instructions failed to give proper effect to admissions in Mylan's pleadings. In its reply to Cyanamid's counterclaims, Mylan admitted that it owed the following duties to Cyanamid: (1) to defend its Maxzide patents against challenges, (2) to defend the protection from competition afforded by its patents, and (3) to defend its FDA approval for Maxzide and the protection afforded by that approval. The court ultimately instructed the jury only that "Cyanamid claim[ed] that Mylan made" these promises. It continued that if the jury found that Mylan failed to perform one of the "alleged" promises, then its verdict "may" be for Cyanamid. If it did not find that Mylan had violated a promise, then its verdict "may" be for Mylan. Cyanamid alleges that this

instruction failed to give the proper conclusive effect to Mylan's admissions.

When reviewing a jury instruction we must examine the instructions as a whole and in the context of the entire case. *Hunnicutt v. Wright*, 986 F.2d 119, 122 (5th Cir. 1993); *see also Hogg's Oyster Co. v. United States*, 676 F.2d 1015, 1019 (4th Cir. 1982) (must view instructions as a whole). Viewing the instructions in context, we are satisfied that Cyanamid was not substantially prejudiced. While the district court described the above duties as "alleged," Mylan officials and other witnesses freely admitted at trial that Mylan owed Cyanamid these duties. No serious factual dispute existed in this regard. The court properly instructed the jury to rule in favor of Cyanamid if it found a breach or in favor of Mylan if no breach occurred. Therefore, we find that any error in the court's instructions was harmless.

D. *Implied covenant of good faith*

Mylan claims that the district court erred in granting judgment as a matter of law on its claim for breach of the implied covenant of good faith and fair dealing. At trial Mylan based its claim on two alleged misrepresentations by Cyanamid. First, Mylan claims that Cyanamid enticed it to enter into an exclusive marketing agreement by misrepresenting its plan to market Maxzide-25 at a 1988 slide presentation. Second, Mylan contends that Cyanamid intentionally omitted fifteen pages from the 1991 Maxzide marketing plan that it gave Mylan. These pages, Mylan maintains, would have shown Cyanamid's intent to deemphasize Maxzide in favor of other drugs.

At the close of Mylan's case in chief, Cyanamid moved for judgment as a matter of law on this claim, asserting that the claim lacked a legally sufficient evidentiary basis and that an implied covenant of good faith would be coextensive with the contract's express best efforts provision. The district court denied the motion on the former grounds, finding that sufficient evidence existed for a reasonable jury to find bad faith. At this point the court did not consider whether the bad faith

claim merely duplicated the claim for breach of the best efforts provision. At the close of evidence Cyanamid renewed its motion for judgment on the pleadings. This time the court granted the motion from the bench on the grounds (i) that the bad faith claim was duplicative of the claim for breach of the best efforts provision and (ii) that to the extent it was not duplicative, it lacked a sufficient evidentiary basis.

Judgment as a matter of law is appropriate when "there is no legally sufficient evidentiary basis for a reasonable jury to find for" the non-moving party. Fed. R Civ. P. 50(a). It should be granted when, viewing the evidence most favorably to the party opposing the motion, a reasonable trier of fact can draw only one conclusion. *Ingram Coal Co. v. Mower Ltd. Partnership*, 892 F.2d 363 (4th Cir. 1989).

West Virginia implies a covenant of good faith into every U.C.G contract. W. Va Code § 46-1-203. In the case of a merchant, "good faith" means "honesty in fact and the observance of reasonable standards of fair dealing in the trade." W. Va. Code § 46-2-103(1)(b). A best efforts provision subsumes an obligation to act in good faith in exercising those best efforts. *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1126 n.7 (3d Cir. 1992). While the U.C.C. covenant of good faith is broader than an exclusive dealer's specific duty to use best efforts, *e.g. Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1443 (7th Cir. 1992); *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990), to survive a motion for judgment as a matter of law Mylan must produce sufficient evidence for a jury to find bad faith beyond mere failure to use best efforts. Otherwise, the claim for breach of the implied covenant is merely duplicative of the claim for breach of an express contract provision and may not be maintained as a separate claim. *See USX Corp. v. Prime Leasing, Inc.*, 988 F.2d 433, 438 (3d Cir. 1993) ("[O]ne can invoke 'implied' terms only when there are no express terms in the contract relating to the particular issue."); *Iafolla v. Douglas Pocahontas Coal Corp.*, 250 S.E.2d 128, 134 n.3 (W. Va. 1978) ("[A]n implied covenant will not supercede [sic] an express contradictory covenant.").

We agree that Mylan's bad faith claim is based on insufficient evidence to the extent that it alleges anything other than a breach of the best efforts provision. With regard to Mylan's "bait and switch" allegation, the slide show presentation occurred *after* Mylan had signed an agreement with respect to Maxzide-25. Therefore, Mylan's claim that Cyanamid "enticed" it to enter into the agreement is insupportable. Mylan's second allegation is based entirely on a marketing plan that it found on the eve of trial was missing pages. Mylan produced no evidence that the pages were missing when Cyanamid gave the plan to Mylan, that Cyanamid knew the pages were missing, or that Cyanamid intentionally omitted the pages in an attempt to conceal information from Mylan. Even drawing all reasonable inferences in Mylan's favor, this allegation is little more than speculation. No reasonable jury could find a breach of the implied covenant of good faith from the evidence that Mylan produced. Accordingly, the district court properly granted judgment as a matter of law in favor of Cyanamid.

E. Tigg *instruction*

Mylan claims that the district court erred in denying its proposed jury instruction with regard to its breach of contract claim. The proposed instruction was based on the Third Circuit's holding in *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1125 (3d Cir. 1992), that a best efforts clause "forces the buyer/reseller to consider the best interests of the seller and itself as if they were one firm." Mylan requested the court to instruct the jury that the best efforts clause required Cyanamid to act in Mylan's best interests rather than its own. *Tigg*, however, involved an implied best efforts provision. The agreement between Mylan and Cyanamid contains an express best efforts provision which explicitly limits Cyanamid's duty to efforts "consistent with its overall business objectives." In other words, the agreement allows Cyanamid to act in accordance with its own objectives if they conflict with those of Mylan. Therefore, the district court properly denied Mylan's proposed instruction.

F. *Mylan's Count I*

Mylan next contends that the district court erred in granting summary judgment on its Count I, which alleged that Cyanamid undercompensated Mylan for its purchases of Maxzide. The Maxzide agreement required Cyanamid to pay Mylan a certain amount for each package of Maxzide that Cyanamid sold. The Saydah Agreement provided a formula for this amount based on Cyanamid's "net sales" or "average selling price." Average selling price was computed by dividing Cyanamid's total revenue by the number of units actually sold. The parties disagree as to whether, when Cyanamid offered a "buy ten, get two free" discount, the two "free" units should have been counted as units "actually sold."

In its motion for summary judgment on this count, Cyanamid attached an affidavit from an expert witness that under normal trade usage the two "free" units would be considered actually sold. Mylan produced no evidence of trade usage, but rather relied on deposition testimony from Mylan and Cyanamid officials regarding their intent. Milan Puskar (Mylan's president) and Rod Jackson (Mylan's vice president) both testified that at the time the Saydah amendment was signed they believed that "free" units should not be considered actually sold. Roben Saydah (Lederle's president at the time the Saydah agreement was signed) also testified about the meaning of "net sales." While his testimony is inconsistent, part of his testimony and a sample calculation that he performed indicate he agreed with Mylan that the "free" goods should not be counted as actually sold.

The West Virginia U.C.C. provides that

> Terms . . . set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade . . . or by course of performance . . . .

W. Va. Code § 46-2-202. Under this provision, evidence of trade usage may explain or supplement even a contract that is clear on its face. *See* W. Va. Code § 46-1-205 cmt. 1 ("The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing."); W. Va. Code § 46-2-202 cmt. 1(c) ("This section definitely rejects . . . [t]he requirement that a condition precedent to the admissibility of [trade usage, course of dealing, or course of performance] is an original determination by the court that the language used is ambiguous."). However, the Code and Commentary leave unclear the extent to which other types of extrinsic evidence of intent may be admissible where a contract term is ambiguous.

The district court, citing § 46-22-202, granted summary judgment in favor of Cyanamid because of Mylan's failure to introduce evidence of trade usage. It did not consider Mylan's evidence of the parties' subjective intent. While the district court did not make clear the basis for its decision, it apparently concluded that under § 46-2-202 only evidence of trade usage, course of dealing, or course of performance is admissible to explain a contract's meaning. Thus, this issue turns on the extent to which Mylan may introduce extrinsic evidence of the parties' subjective intent to show the meaning of a contract under the U.C.C.

The U.C.C. modified the common law parol evidence rule by giving special weight to evidence of trade usage and commercial practices. In effect, trade usage becomes part of the contract:

> [Contracts] are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used.

W. Va. Code § 46-2-202 cmt. 2. *See also* W. Va. Code § 46-1-205(3) ("[A]ny usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give[s] particular meaning to . . . terms of an agree-

ment.") Other types of extrinsic evidence may be admissible to explain an ambiguous contractual term. However, because trade usage is deemed incorporated into the contract unless specifically negated, it must be considered when determining whether a term is ambiguous. Parol or extrinsic evidence like that offered by Mylan is inadmissible to explain a term which is unambiguous when read in light of trade usage.

Furthermore, Mylan's proffered evidence shows at most the parties' unexpressed, subjective interpretations of a contract term. Both the U.C.C. and West Virginia common law express a preference for objective, rather than subjective, manifestations of intent. *See* W. Va. Code § 46-1-205 cmt. 1 ("[T]he meaning of the agreement of the parties is to be determined by *the language used by them and their action*, read and interpreted in the light of commercial practices and other surrounding circumstances (emphasis added)); *Watson v. Buckhannon River Co.*, 45 W. Va. 164, 175 (1923) ("[W]hen there is doubt as to [a contract's] proper meaning, the construction which the parties have put upon it *by their acts* is entitled to great consideration." (emphasis added)); Restatement (Second) of Contracts § 212 cmt. a (1981) ("[T]he relevant intention of a party is that manifested by him rather than any different undisclosed intention.").

Because the term "net sales" was unambiguous in light of Cyanamid's uncontested evidence of trade usage, the district court properly disregarded Mylan's proffered evidence of subjective intent. We therefore affirm the district court's grant of summary judgment on this claim.

G. *Mylan's Count V*

Count V alleged that the Saydah Agreement created a separate requirement that Cyanamid purchase a minimum quantity of Maxzide-25 in addition to Cyanamid's existing obligation to purchase a minimum quantity of Maxzide. Mylan argues that the series of correspondence leading up to the letter signed by both parties should be considered part of the Saydah Agreement. It claims that that correspondence taken as a whole shows that the parties intended to create

a separate minimum quantity requirement for Maxzide-25. The district court held that the prior correspondence was at most a series of offers and counteroffers, was not part of the contract, and was therefore inadmissible parol evidence. It concluded that the Saydah Agreement did not create a separate minimum purchase requirement for Maxzide-25. Finding no error, we affirm the judgment on this count on the reasoning of the district court. *Mylan Pharmaceuticals, Inc. v. American Cyanamid Co.*, Civ. No. 90-0121-C(S) (N.D.W. Va. July 27, 1993).

H. *Failure to recuse*

Mylan argues that the judge below erred in failing to recuse himself. While the summary judgment motions were pending, one of the judge's law clerks contacted Cyanamid's local counsel regarding potential employment. After the motions had been decided, the clerk interviewed with the firm and eventually received, but did not accept, an employment offer. The clerk continued to work on the case until Mylan's motion for recusal on the eve of trial. The judge then removed him from the case.

We find the district judge's action was entirely proper. A judge need recuse himself only when his impartiality might reasonably be questioned. 28 U.S.C. § 455(a); *People Helpers Found, Inc. v. City of Richmond, Va.*, 12 F.3d 1321, 1325 (4th Cir. 1993). The mere fact that a judge's clerk interviews with counsel for a party regarding potential future employment does not by itself create a reasonable question as to the judge's impartiality. While a law clerk must be removed from a case if he *accepts* an employment offer from a party's counsel, *see, e.g, Hunt v. American Bank & Co.*, 783 F.2d 1011, 1016 (11th Cir. 1986), in this case the judge's clerk did not accept an offer. *See* Alvin B. Rubin & Laura B. Bartell, Law Clerk Handbook 23 (1989) (stating only that "[w]hen a clerk has *accepted* a position with an attorney or with a firm, that clerk should cease further involvement in those cases in which the future employer has an interest," and implying that a judge may choose to place "no restrictions . . . on a law

clerk's applications for employment" (emphasis added). Furthermore, the judge removed the clerk from this case as soon as he was aware that the clerk had received an employment offer from Cyanamid's local counsel. This was sufficient to avoid an appearance of impropriety. *See Hunt*, 783 F.2d at 1016; *Reddy v Jones*, 419 F. Supp. 1391 (W.D.N.C. 1976). Therefore, the judge did not err in failing to recuse himself.

I. *Denial of summary judgment on Cyanamid's counterclaim for fraudulent inducement*

Mylan next maintains that the district court erred in denying its motion for summary judgment on Cyanamid's fraudulent inducement counterclaim. Despite the fact that the jury awarded no damages on this counterclaim, Mylan claims that it was prejudiced on its other claims by evidence that was admitted solely to establish fraudulent inducement. If summary judgment had been granted before trial, Mylan maintains, this evidence would have been excluded. Thus, Mylan is in the unusual posture of appealing a count on which it prevailed at trial.

Nearly every circuit to consider the issue has held that the denial of a motion for summary judgment may not be appealed following a final verdict on the merits. *See, e.g., Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994); *Black v. J.I. Case Co.*, 22 F.3d 568, 570-71 (5th Cir.), *cert. denied*, 115 S. Ct. 579 (1994); *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19* F3d 431, 434 (8th Cir. 1994); *Lama v. Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358 (9th Cir. 1987). Because denial of summary judgment is interlocutory, *O'Connor v. United States*, 956 F.2d 48, 52 (4th Cir. 1992), the only appealable final judgment is the judgment on the verdict. *Johnson Int'l*, 19 F.3d at 434.

Thus, Mylan seeks to appeal a verdict in its favor. A party generally may not appeal an issue on which it prevailed on the merits. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333 (1980). While an exception exists permitting a party to appeal "an adverse ruling collateral to judgment on

the merits" if that party retains a stake in the controversy, *id.* at 333-34, a summary judgment motion is not collateral to the merits of a claim. Therefore Mylan's appeal does not fall within this exception, and we may not review the district court's denial of summary judgment.

J. *Other errors*

Mylan asserts that the district court committed four additional errors warranting reversal. First, it claims that the court improperly excluded evidence that Mylan "blew the whistle" on fraudulent practices by other manufacturers of generics. Second, it claims that the court erred in allowing Cyanamid's expert to testify as to analyses that he performed after he was deposed. Third, it maintains that the order of closing arguments was improper. Finally, it asserts that the court erred in excluding testimony about Puskar's charitable contributions. We find that none of these actions was error and affirm on the reasoning of the district court. *Mylan Pharmaceuticals, Inc. v. American Cyanamid Co.*, Civ. No. 90-0121-C(S) (N.D.W. Va. Feb. 28, 1994).

K. *Jury verdict on Mylan's Counts II and III*

Finally, Mylan claims that the verdicts on its two counts for breach of the best efforts provision were against the weight of the evidence. Judging the weight of the evidence is "a matter resting within [the district court's] sound discretion and is not reviewable save in the most exceptional circumstances." *Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989). Here, plenty of evidence indicated that Cyanamid did not breach the best efforts provision, including evidence that (1) Cyanamid strongly promoted Maxzide, (2) Maxzide's market loss was no greater than that of other brand-name drugs faced with generic competition, and (3) independent reasons existed for Maxzide's decline, including weak patent protection, changes in medical thinking, and FDA actions. The district court did not abuse its discretion in refusing to grant a new trial.

III

For the foregoing reasons, the judgment of the district court is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion on Cyanamid's counterclaim for defamation.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 90-0121-C(S)
Filed: July 27, 1993

MYLAN PHARMACEUTICALS, INC.,
a West Virginia corporation,

Plaintiff and Counterclaim Defendant,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Defendant and Counterclaimant,

—v.—

ROY MCKNIGHT,

Third-Party Counterclaim Defendant.

MEMORANDUM OPINION AND ORDER RESOLVING MOTIONS FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS

I. Background

Pending before this Court are three (3) motions for summary judgment and a motion for judgment on the pleadings

filed in connection with the above civil action filed by plaintiff Mylan Pharmaceuticals, Inc. ("Mylan") against defendant American Cyanamid Company ("Cyanamid") and the counterclaims filed by Cyanamid against Mylan, individually, and against Mylan and a third-party counterclaim defendant Roy McKnight ("McKnight"). These claims, set forth in the Complaint as amended, arise out of certain contracts between Mylan and Cyanamid which provided that Cyanamid's Lederle Laboratories Division ("Lederle") would be the exclusive marketer in this country for Maxzide®, a drug used for the control of hypertension and developed and patented by Mylan. Mylan originally filed its Complaint against Cyanamid in November 1990. Mylan alleged, in four counts, that Cyanamid had breached its marketing contract with Mylan dated March 6, 1984, as modified by a letter dated February 5, 1988 from Robert Saydah ("Saydah") of Cyanamid's Lederle Division to Mylan's President Milan Puskar ("Puskar"), and signed by Puskar ("Saydah Amendment").

As noted in the Pre-Trial Order, Count I of the Amended Complaint alleges breach of contract in the computation of Mylan's compensation for Maxzide® delivered to Cyanamid after the effective date of the Saydah Amendment, which changed the original terms of compensation from a fixed price to a "20% ratio to net sales" basis. Counts II and III assert that Cyanamid breached its obligation under the basic contract requiring Cyanamid to make certain efforts to market Maxzide®. In Count IV, Mylan claims that Cyanamid breached an implied covenant of good faith and fair dealing with respect to its performance under the Maxzide® contract.[1]

Mylan amended its Complaint to assert a new claim, Count V, which alleges that the Saydah Amendment created a new contract dealing with the marketing of Maxzide®-25 mg. ("Maxzide®-25"), imposing upon Lederle an independent minimum purchase requirement for that form of Maxzide® and that Cyanamid failed to meet those minimum purchase requirements.

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[1] Mylan also originally filed a separate tort claim, as part of Count IV, for punitive damages which was dismissed by this Court by order dated April 29, 1991. The contract claim remains in Count IV.

Cyanamid, in turn, has filed four counterclaims. It originally filed three counterclaims against Mylan, in responding to the original Complaint.

By its first counterclaim, Cyanamid asserts that Mylan fraudulently induced Cyanamid to enter into the Maxzide® contract by misrepresenting the strength of patent protection Maxzide® would enjoy and by not giving Cyanamid certain material information by which Cyanamid could have determined that Maxzide®'s patent protection was weak. In its second counterclaim, Cyanamid claims that Mylan breached its duty to defend the Maxzide® patent and to defend Maxzide® from competition by generic drugs by failing, among other things, to adequately defend challenges to the Maxzide® patent made by competing companies, including Vitarine Pharmaceuticals.

Cyanamid's third counterclaim, as amended, alleges that Mylan and McKnight, Mylan's chief executive officer, are liable for defamation because of allegedly false and disparaging public remarks supposedly accusing Cyanamid of incompetence as a marketer of pharmaceuticals, and untrustworthiness as a part of the Maxzide® contracts. A fourth counterclaim, added by amendment, asserts that Mylan breached covenants under the Maxzide® agreement in failing to secure Federal Drug Administration ("FDA") approval for its advertising claims that Maxzide® was therapeutically superior to another similar drug known as Dyazide®, a product of SmithKline Beecham, also used for the treatment of hypertension and for product labeling.

Cyanamid has filed a motion for summary judgment under FED. R. CIV. P. 56 with respect to Mylan's Count I and a motion for judgment on the pleadings under FED. R. CIV. P. 12 (C) as to Mylan's Count V.

Mylan, in turn, has filed a motion for summary judgment as to Count I (fraudulent inducement) of Cyanamid's counterclaim and Mylan and McKnight have filed a motion for summary judgment as to Count III of the amended counterclaim of Cyanamid (defamation).

All motions have been fully briefed. There is no outstanding discovery with respect to these motions.

For the reasons set forth below, this Court believes that Cyanamid's motion for summary judgment as to Mylan's Count I should be GRANTED; that Cyanamid's motion for judgment on the pleadings as to Count V should be GRANTED; that Mylan's motion for summary judgment as to Count I of Cyanamid's counterclaim should be DENIED; and that Mylan's and McKnight's motion for summary judgment as to Count III of Cyanamid's counterclaim should be GRANTED.

This Court will address separately the various summary judgment motions and the motion for judgment on the pleadings.

II. Rule 56 Standards

Under FED. R. CIV. P. 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." *Id.* The party seeking summary judgment bears the initial burden of showing the absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). However, as the United States Supreme Court noted in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), "Rule 56(c) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 256. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. *See also Trivathan v. Newport News Shipbuilding & Dry Dock Co.*, 944 F.2d 902 (4th Cir. 1991) [table] ("Summary judgment should be granted only in those cases where it is per-

fectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *(citing Charbonnage De France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950))).

In *Celotex*, the Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Summary judgment is not appropriate until after the non-moving party has had sufficient opportunity for discovery. *Oksanen v. Page Memorial Hospital*, 912 F.2d 73, 78 (4th Cir. 1990). In reviewing the supported underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The parties have submitted deposition transcripts and documentary evidence in conjunction with their respective motions and memoranda. No discovery requests appear to remain outstanding.

III. Rule 12(c) Standards

A Rule 12(c) judgment on the pleadings is addressed to the function of disposing of cases on the basis of the underlying substantive merits of the claims and defenses as revealed in the formal pleadings and what is subject to judicial notice. 5A C. WRIGHT & A. MILLER *Federal Practice and Procedure: Civil 2d* § 1367 (1990). A Rule 12(c) motion should not be granted unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Haines v. Kerner*, 404 U.S. 519 (1972); *Mostowy v. United States*, 966 F.2d 668, 672 (Fed. Cir. 1992). The moving party must clearly establish that he is entitled to judgment as a matter of law, and all pleadings

are considered in the light most favorable to his adversary. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478 (6th Cir. 1973); *Roemheld v. Jones*, 239 F.2d 492 (8th Cir. 1957).

IV. Cyanamid's Motion for Summary Judgment on Count I of Mylan's Amended Complaint—"Free Goods"

With respect to this motion, it is undisputed that:

1. Under the terms of the Maxzide® Agreement, Cyanamid's Lederle Division had complete authority with respect to the establishment of the prices at which it would sell Maxzide® to its customers.

2. Under the terms of the Maxzide® Agreement, as amended on February 5, 1988, following the entry of generic competition, the price charged by Mylan to Lederle for both the Maxzide®-50 mg. ("Maxzide®-50") and Maxzide®-25 strengths is 20 percent of net sales, with a minimum price of $6.15 per 100 tablet bottle of Maxzide®-50 and $4.25 per 100 tablet bottle of Maxzide®-25.

3. By common definition, "net sales" equals the balance of gross sales remaining after deducting trade discounts, rebates, returned sales and sales allowances. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) 1520 (1981); BLACK'S LAW DICTIONARY 1041 (6th Ed. 1990).

4. a. From time to time Lederle reacts to competition with promotional offers of "free goods" to induce customers to purchase larger quantities of Maxzide®, or to grant important customers price discounts, without altering Lederle's normal pricing structure or changing the list price of Maxzide®, although Mylan disputes whether all such promotional offers were made for this purpose.

b. Under the standard use of the term "free goods", customers to whom "free goods' offers of Maxzide® are extended must purchase a specified quantity of the product at the list price in order to receive the corresponding number of "free"

units. No "free goods" are distributed in circumstances other than when the customer has fulfilled the agreed-upon purchase requirement. "Free goods" are units of Maxzide® that are packaged and labelled identically with other bottles of the drug delivered to customers.

While Mylan agrees with Cyanamid's dictionary definition of the term "net sales", it asserts that there is a genuine issue of material fact as to whether "free goods" as distributed by Cyanamid should be considered as "trade discounts" to calculate "net sales" under the Maxzide® agreements. Further, while Mylan concedes that the "free goods" offers made by the Lederle are, as a matter of economic theory and business reality, a type of quantity discount which is economically and functionally identical to a discount based upon a percentage off of list price (i.e. a "buy three get one free" offer is indistinguishable from a 25 percent discount with a minimum purchase of four units), Mylan contends there exists a genuine issue of material fact as to whether a "free goods" promotional offer is the same as a price discount for the particular purpose of calculating "net sales" and, therefore, Mylan's per unit compensation under the Maxzide® agreements, it being Mylan's assertion that the cost of a "free goods" promotion was to be considered as part of the advertising and promotion costs to be borne by Cyanamid under the Maxzide® agreements and that the units distributed as "free goods" were not to be included in calculating average selling price to determine the amount of Mylan's compensation. In addition, Mylan agrees that "free goods" do not serve the same function as samples, which are not contingent upon purchase of the product, but are given to physicians to enable them to become familiar with a drug and to start patients on that drug. However, Mylan agrees with this distinction only as it shows the difference between the two marketing techniques but disagrees that this means that "free goods" promotions do not constitute a part of the advertising and promotion of a product. It is undisputed that samples, as a form of advertising and promotion, serve an informational and promotional purpose, stimulating awareness in the medical community of the prod-

uct, thus creating additional demand. Under the Maxzide® Agreement, Lederle buys samples in bulk from Mylan at a fixed price. These samples are specifically packaged for that purpose, are distributed only to physicians and cannot be resold. Further, while Mylan agrees that generally accepted accounting principles require that units delivered in satisfaction of "free goods" offers, such as those offered by Lederle for Maxzide®, be accounted for as units sold, it disagrees that this means that the cost of "free goods" should not be considered as an advertising or selling expense under the Saydah Amendment.

Simply put, Cyanamid contends that "free goods" do not constitute either an advertising or a selling expense but, rather, are a form of discount which reduces the unit price of the goods sold as an inducement for a greater sales volume.

While Mylan does not appear to quarrel with the strict accounting definition of "free goods", it argues that Cyanamid's witnesses during discovery have, themselves, used the term in a manner connoting promotion or inducement to purchase.

Mylan states that the issue in Count I is how the "per unit" compensation due Mylan for all units shipped to Cyanamid in any compensation period should be calculated when "free goods" promotions were offered by Cyanamid.

Cyanamid, as part of its Appendix supporting its motion for summary judgment, has provided the affidavit of Richard P. Rozek, an economist with National Economic Research Associates, Inc., which, based upon his experience analyzing pricing and marketing practices generally and particularly in the pharmaceutical industry discusses the forms of various discounts including the use of "free goods" which he points out "are commonplace in the packaged goods industry". In particular, Mr. Rozek then concludes at paragraphs 7, 8 and 15:

> 7. It would be illusory to regard the units of the product obtained at such a discount as actually being free. The so-called "free" units are not "given away," but rather are an integral part of the bargain between the buyer and seller. These additional free units are equiv-

alent to a volume discount that alternatively could be expressed as a percentage priced reduction conditioned on the purchase of an entire set of units. For example, a sale of "one free with purchase of three" is the same as offering a 25 percent discount with the purchase of four units. Either way, it amounts to a revenue reduction to the seller of that amount.

8. In the case of pharmaceuticals, free goods offers to wholesalers, pharmacies or government agencies do not serve an advertising function. It would be misleading to characterize the cost of the units included in volume transactions of this sort as a sales or advertising expense. By providing this form of discount, the seller merely receives less revenue from the sale of the product. . . .

15. In sum, the free goods components of the deals at issue in this case do not represent advertising expenditures. They are simply a form of discount from list price. Such discounts are part of the bargained for consideration between the buyer and seller. They reduce the transactions price compared to the list price for the product. Thus, they reduce the sales revenue from the aggregate number of units sold. Treating the delivery of these units as an ASP expense, and not including them in net sales, would present a distorted picture of a firm's sales, the value of the product to customers, and the prices actually realized in the marketplace.

Therefore, Mr. Rozek in effect sets forth evidence from Cyanamid's standpoint as to the treatment of "free goods" in the pharmaceutical marketplace, speaking to the usage of trade under the Uniform Commercial Code as it is enacted in West Virginia in W. VA. CODE § 46-1-205 (1966) . The meaning of an agreement must be determined by the language the contracting parties used read in the light of commercial practices. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

W. VA. CODE § 46-1-205, Comment 1, (*quoted in Witner v. Kleppe*, 469 F.2d 1245 (4th Cir. 1972).

Mylan, in responding some months ago to Cyanamid's motion to dismiss Count I under FED. R. CIV. P. 12(b)(6), which motion this Court denied, stated:

> Obviously, it is Mylan's position, as its experts and others will testify, that the term "net sales" as used in the pharmaceutical industry, and under generally accepted accounting principles, does not include reductions for free goods distributed for promotional purposes. Such costs instead are deemed marketing or promotional costs, similar to personnel and advertising expenses and treated as costs of goods sold. No doubt free goods costs are incurred, but they are solely Cyanamid's burden . . . .
>
> Mylan seeks . . . the right to adduce evidence in support of the custom and usage of trade upon which it relied at the time it made its various agreements with Cyanamid, which custom and usage of trade, by express statutory provision, must be considered by the Court in any determination of the rights of the parties.

Plaintiff's Opposition to Motion to Dismiss, Feb. 26, 1991, at 8-9.

However, Mylan has presented no evidence in connection with Cyanamid's motion for summary judgment to refute the detailed affidavit of Mr. Rozek and the evidence of Cyanamid by other witnesses as to trade usage of "free goods" and its impact upon the calculation of compensation through either the term "net sales" or "average selling price" under the Saydah Amendment, at least none to set forth any genuine issues of material fact on this subject.

In the context of this motion, Mylan defends the evidence presented by the Rozek affidavit and other evidence by simply contending:

In asserting that there is no genuine issue of fact as to how "free goods" should be treated in calculating Mylan's compensation, Cyanamid conveniently ignores the fact that it has to date refused to depose Mylan's expert witnesses, who are

expected to support Mylan's interpretation of the agreements with respect to compensation calculations. Appendix J, Memorandum in Opposition to Defendant's Rule 56(c) Motion for Summary Judgment on Count I of the Amended Complaint, May 19, 1993, at 2.

The fact that Cyanamid, for whatever reason, did not take the deposition of Mylan's designated expert witnesses on this subject does not in any way preclude Mylan from obtaining and submitting a counter-affidavit in opposition to Cyanamid's motion on Count I sufficient to at least raise a genuine issue of fact on the issue of "free goods" in the interpretation of the Saydah Amendment and the determining of compensation to Mylan under the contract. This has not been done by Mylan and Mylan has presented no other evidence sufficient to show a genuine issue of material fact. Mylan cannot rest alone upon its pleadings and its counsel's argument. Further, this Court finds no support for the claim in Count I that Cyanamid failed to exercise its pricing discretion in good faith, at least as it applies to the "free goods" issue.

For the above reasons, Cyanamid's motion for summary judgment as to Count I of the Amended Complaint is GRANTED.

V. Defendant American Cyanamid's Motion to Dismiss Count V of Mylan's Amended Complaint

This motion is filed by Cyanamid pursuant to FED. R. CIV. P. 12(c) for judgment on the pleadings as to Count V of Mylan's Amended Complaint.

In Count V of the Amended Complaint, Mylan incorporates by reference the allegations it has made in paragraphs 1-37, 39-47, 49-56, 58-65 and 67-77 of the Amended Complaint and contends that "[i]n addition to the breaches alleged in the preceding counts of this Complaint, Defendant otherwise breached its obligations under the agreements to purchase certain minimum quantities of Maxzide® and/or Maxzide®-25 as specified in Paragraph 7 of the Contract of March 6, 1984 for Maxzide® (Exhibit A hereto) and as required by the

"Saydah Amendment" for Maxzide®-25 (Paragraphs 31 and 32 above)."

Paragraphs 31 and 32 of the Amended Complaint read as follows:

> 31. After brief negotiations, Mylan and the then-management of Defendants' Lederle Division reached an agreement which allowed Lederle to assume a role with regard to the new product almost identical in terms to its Maxzide® agreement. In fact the material terms varied only in the areas of price and product specifications.
>
> 32. Although the agreement with regard to the 37.5/25 mg product was never reduced to formal contract, it was embodied in a series of correspondence which included: a letter from Robert Saydah, then Vice President of Defendants' Lederle Division, to Milan Puskar, then and now president of Mylan, dated January 19, 1988; Puskar's letter in response of January 27, 1988; and a further letter from Saydah, dated February 5, 1988, which Puskar also signed; copies of which letters are attached hereto as Exhibits B, C and D, respectively, and are hereinafter referred to, collectively, as the "Saydah Agreement".

Cyanamid in its attack upon Count V by way of its motion of judgment on the pleadings, analyzes the three letters cited in paragraph 32 of the Amended Complaint and asserts that because of the West Virginia statute of frauds and the parol evidence rule, these documents do not establish an enforceable independent agreement binding Cyanamid to buy minimum quantities of Maxzide®-25.

First, Cyanamid maintains that the only document of the three documents alleged by Mylan to form the independent minimum purchase contract, which is an agreement between the parties, is the February 5, 1988 letter (i.e. the "Saydah Amendment") and this document is only an amendment to the original Maxzide® Agreement of March 6, 1984 and is not an agreement which imposes a requirement to make minimum purchases of Maxzide®-25.

Cyanamid states that the other two documents referenced in paragraph 32 of the Amended Complaint, the January 19, 1988[2] letter from Robert Saydah of Cyanamid to Milan Puskar of Mylan and the January 27, 1988 letter in response from Puskar to Saydah dated January 27, 1988, is merely a proposal and a counter-proposal, neither of which were accepted by the other party. Cyanamid points out that these two letters are not incorporated into or referred to by the Saydah Amendment of February 5, 1988, which is signed by both parties.

Cyanamid argues that the two letters of January 19, 1988 and January 27, 1988 independently could not constitute an enforceable contract since they do not meet the requirements under the West Virginia statute of frauds.

The West Virginia statute of frauds provides, in part:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.[3]

Cyanamid also contends that the February 5, 1988 Saydah Amendment does not constitute an independent contract for minimum purchases of Maxzide®-25 under the statute of frauds because the quantity is not specified.

Cyanamid maintains that the Puskar letter of January 27, 1988 is merely a statement of a negotiating position regarding Maxzide®-25 tablets. The Puskar letter states that Mylan

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[2] The typed date of this letter is actually January 20, 1988.

[3] The parties appear to agree that the statute of frauds under the West Virginia Uniform Commercial Code, rather than the more general statute of frauds under W. VA. CODE § 55-1-1, *et seq.* is applicable.

has "concluded" that the "basic terms and conditions of the Maxzide® contract, dated March 6, 1984 should control with the exception of the pricing. . . ." It then recites certain prices, the effective dates, and how subsequent adjustments to Cyanamid's price to customers would offset a change in Mylan's prices to Cyanamid. The Puskar letter is not signed by any representative of Cyanamid. The Puskar letter is in response to Saydah's letter to Puskar dated January 19, 1988 and appears to this Court to be a proposal which was not accepted by Mylan in the subsequent January 29, 1988 letter. This Court believes that, at best, the two letters are merely an offer by one party which was not accepted by the other. Moreover, the February 5, 1988 Saydah Amendment does not incorporate the above-mentioned two letters into that contract, and even though it is a contract, it is not an independent arrangement for the purchase of a specific quantity of Maxzide®-25 tablets.

W. VA. CODE § 46-2-202 (1966), a codification of the parol evidence rule in the Uniform Commercial Code states, in part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented. . .
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

This Court further finds that the letters of January 19, 1988 and January 27, 1988 should be excluded under the above statute because this Court believes that the original Maxzide® Agreement of March 6, 1984 and the Saydah Amendment

were intended by the parties to form and constitute a complete and exclusive statement of those agreements.

Mylan asserts for the first time in Plaintiff's Memorandum in Opposition to Defendant's Rule 12(c) Motion to Dismiss Count V of the Amended Complaint that another letter, one dated November 6, 1985 from Cyanamid's Group Manager L. J. Marquard to Mylan should form the basis of an independent agreement. This letter is not cited in or attached to the Amended Complaint as a basis for Mylan's claims under Count V.

FED. R. CIV. P. 12 (C) provides that if matters in addition to the pleadings are presented and are not excluded in a motion for judgment on the pleadings, the motion shall be treated as one for summary judgment in accordance with FED. R. CIV. P. 56. It is in the Court's discretion whether to accept a matter in addition to the pleadings. *A. S. Abell Co. v. Baltimore Typographical Union Number 12*, 338 F.2d 190 (4th Cir. 1964), *M. L. Lee & Co. v. American Cardboard & Packaging Corp.*, 36 F.R.D. 27 (E.D. Pa. 1964); *see* 5A C. WRIGHT & A. MILLER § 1371.

This Court concludes that the Marquard letter should be excluded because Mylan specifically based its Count V claim upon the above-mentioned three letters and the Marquard letter, written over two years before the Saydah or Puskar letters and the Saydah Amendment, does not appear to have been referred to or incorporated into any of these documents, and is not relevant to a determination of the claim.[4]

For the above reasons, this Court finds that the motion of American Cyanamid for judgment on the pleadings as to Count V must be GRANTED.

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[4] Even if this Court were to convert this motion for judgment on the pleadings to a summary judgment motion, which it does not, it would find that this single letter would not result in a denial of summary judgment for Cyanamid on Count V of the amended complaint.

VI. Counterclaim Defendant Mylan's Motion for Summary Judgment on Cyanamid's Counterclaim for Fraudulent Inducement (First Counterclaim)

Cyanamid's first counterclaim to the Amended Complaint charges that Mylan fraudulently induced Cyanamid to enter into the Maxzide® Agreement by misrepresenting the strength of the patent protection Maxzide® would enjoy, and by failing to provide Cyanamid with material information from which Cyanamid would have determined that Maxzide®'s patent protection was weak. This claim is set forth as paragraphs 97 through 114 of Cyanamid's amended answer and counterclaims. Stated another way, Cyanamid believes that Mylan misrepresented the availability of market exclusivity through patent protection and that Cyanamid reasonably relied upon these misrepresentations when it entered into its Maxzide® marketing agreement with Mylan.

Pursuant to LOCAL COURT RULE 2.07(d), Mylan has filed a statement of undisputed facts in support of its motion for summary judgment as to the first counterclaim of Cyanamid. In turn, Cyanamid, under LOCAL COURT RULE 2.07(d), has filed its statement of the genuine issues to be tried on the first counterclaim.

As noted by Mylan, a party making a claim for fraudulent inducement must establish: (1) a material misrepresentation by the defendant; (2) reasonable reliance on that misrepresentation by claimant and (3) damages resulting from the reliance. RESTATEMENT (SECOND) OF TORTS § 525. It is also agreed that proof of these elements must be by clear and convincing evidence. Mylan claims that no such misrepresentations were ever made and that even "if any false impression was created by Mylan's enthusiasm for its produce, Lederle did not rely on that impression in deciding to enter into the agreement." Memorandum in Support of Counterclaim Defendants' Motion for Summary Judgment on Cyanamid's Counterclaim for Fraudulent Inducement at 4. On the other hand, Cyanamid asserts that Mylan frequently stated that Maxzide®

would enjoy certain market exclusivity under a "unique" process known as "parallel granulation", which according to Cyanamid turned out not to be unique at all, and that Mylan had no basis for believing this. Cyanamid also contends through certain deposition testimony that Mylan was aware that Cyanamid would not risk its corporate resources needed to "launch" and market Maxzide® without having market exclusivity obtained by patent.

Cyanamid argues that there are genuine issues of material fact which exist not only as to Mylan's state of mind respecting certain statements but also as to Cyanamid's reliance upon such statements. Cyanamid notes that under West Virginia law an action for fraud lies where a defendant either knows that a statement is false, makes the statement without knowledge as to its truth or falsity, or makes it under circumstances such that he should have known of its falsity. The defendant is under a duty to know that the things he represents as facts are in fact true at the time he makes the representation. *Lengyel v. Lint*, 167 W. VA. 272, 280 S.E.2d 66, 69 (1981).

While agreeing that a claimant's reasonable reliance is a key element in a fraud claim, Mylan points out, citing *Rockley Manor v. Strimbeck*, 181 W. VA. 313, 382 S.E.2d 507 (1989), that:

> Though a purchaser may rely upon particular and positive representations of a seller, yet if he undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller.

However, as Cyanamid asserts, in those situations where parties lack equal knowledge regarding the subject matter of a transaction, a party who has acted with reasonable diligence may rely on the representations of the party with superior means and opportunity to acquire information, and may recover for fraud if material facts are misrepresented. 37 AM.JUR.2D *Fraud & Deceit* § 253 (1968).

While this Court recognizes that the burden of proof for Cyanamid on its first counterclaim is ultimately a rather heavy one specifically, proof by clear and convincing evidence, the Court believes that at this stage of this civil action, Cyanamid has presented sufficient material to counter Mylan's pre-trial motion for summary judgment and that, at this point, there appear to be genuine issues of material fact on the fraudulent inducement counterclaim. Consequently, for the reasons set forth above, the motion of Mylan for summary judgment on Cyanamid's first counterclaim must be DENIED.

VII. Counterclaim Defendant Mylan and McKnight's Motion for Summary Judgment on Cyanamid's Counterclaim for Defamation (Third Counterclaim)

Cyanamid's third counterclaim asserts that Mylan and its chairman and chief executive officer McKnight are liable in compensatory and punitive damages to Cyanamid for defamation arising out of several allegedly false and disparaging statements accusing Cyanamid of incompetence in marketing pharmaceuticals and unworthiness as a contracting party.

Cyanamid alleges that the defamatory statements made by two Mylan representatives, Roy McKnight and Patricia Sunseri, and attributable to Mylan are:

> (1) a false report by Patricia Sunseri, Mylan's Vice President-Investor and Public Relations, repeated in the New York Times, that Cyanamid failed adequately to promote Maxzide®; (2) a false accusation by McKnight, reported verbatim in a business newspaper, that Cyanamid was "not living up to its contract" with Mylan; (3) false charges of wrongdoing on Cyanamid's part, including breach of contract, made by McKnight to an important annual gathering of pharmaceutical industry representatives and trade media in New York; and (4) false accusations, made by Sunseri to an investment analyst specializing in the pharmaceutical industry, and subse-

quently widely disseminated, that Cyanamid ceased ordering Maxzide® from Mylan in response to the filing of Mylan's complaint in this action.

Counterclaimant American Cyanamid Company's Memorandum of Law in Opposition to Motion of Counterclaim Defendant Mylan Pharmaceuticals, Inc. for Summary Judgment Dismissing the Third Counterclaim for Defamation at 3.

(a) *Roy McKnight's Initial Statement*

On April 16, 1991, following the filing of this lawsuit by Mylan against Cyanamid in November 1990, and after presumably the reports of the lawsuit had circulated within the pharmaceutical industry, McKnight acting for Mylan spoke to a group of pharmaceutical industry representatives and members of the trade media at the Furman Selz Generic Drug Conference in New York. In the course of commenting upon this civil action, McKnight said: [O]ur orders from Lederle have really dwindled. In fact, at the moment, they're nonexistent." McKnight went on to say that Lederle was "digging its hole deeper and deeper." Cyanamid contends that these statements were false because Lederle had actually been continuing at routine levels to place substantial orders for both Maxzide® and Maxzide®-25 and that McKnight (and, therefore, Mylan) either knew the statements concerning lack of orders were false or made no attempt to confirm their accuracy (i.e. that the statements were made maliciously, with the intent to defame Cyanamid, either with knowledge of their falsity or with reckless disregard for their truth). These remarks, says Cyanamid, impugned its character and business reputation, "carrying the strong implication that Cyanamid was incompetent, negligent or otherwise unfit as a marketer of pharmaceuticals or as a business partner". Pre-Trial Order at p. 43. Further, Cyanamid states that McKnight's defamatory remarks continued when these remarks were reported in the April 22, 1991 edition of the F-D-C Reports, also known as "The Pink Sheet", a weekly publication purportedly having a broad circulation throughout the pharmaceutical industry.

(b) *Additional Statements*

Cyanamid asserts that two months after McKnight's defamatory statements about Cyanamid (and after Cyanamid's original defamation counterclaim was filed) Patricia Sunseri, Vice President-Investor and Public Relations for Mylan, made similar defamatory statements about Cyanamid. In June 1991, Glenn Reicin, an investment analyst with Oppenheimer & Co., Inc. ("Oppenheimer") called Sunseri to request information about Mylan's performance during the first quarter of Mylan's 1992 fiscal year. Cyanamid notes that the purpose of Reicin's call was to collect financial data in order to provide advice to investors.

Cyanamid says that Sunseri falsely informed Reicin that Cyanamid had stopped ordering Maxzide® in response to this lawsuit by Mylan. Cyanamid then alleges that Reicin later incorporated that false statement by Sunseri into his investor's newsletter dated July 19, 1991, which reported:

> [Mylan's] sales are weak since American Cyanamid has stopped ordering the company's largest selling product, Maxzide® (antihypertensive). We estimate that Maxzide® sales fell in the $15 million area in fiscal 1991.
>
> Mylan has sued Cyanamid for not promoting Maxzide® to the best of its ability. Mylan wants the product back. Unfortunately, Cyanamid responded with a cutoff in orders for the product.

Pre-Trial Order at p. 44; Amended Answer and Counterclaims pp. 31-32.

The Reicin report was then circulated by Oppenheimer and was mailed to its investor clients as well as to other companies in the health care field. The allegedly false statement was also republished in an issue of "SCRIP", a newsletter supposedly widely circulated within the international pharmaceutical industry. "SCRIP", reported, in or around June 1991:

> American Cyanamid has responded to Mylan's $240 million suit agains. it for alleged violation of a mar-

> keting agreement for the antihypertensive/diuretic, Maxzide® (triamterene-HCTZ), by ceasing all orders of the product from Mylan, according to Oppenheimer & Co. analyst Glenn Reicin. Mylan has noted that sales of Maxzide® were depressed in fiscal 1991; Mr. Reicin estimates that sales could have fallen by $15 million compared with the previous year.

Cyanamid also accuses Mylan of other defamatory statements by Mylan through Sunseri. Cyanamid claims that Sunseri was interviewed by the *New York Times*, following which interview that newspaper reported in August 1990, before Mylan filed this suit, in an article dealing with Mylan's options for distributing another drug, Eldepryl®:

> Mylan could also set up an exclusive licensing agreement similar to the one it struck with American Cyanamid Company's Lederle unit six years ago to market Maxzide®, Mylan's branded blood-pressure drug. But Mylan executives say they have ruled out that option.
>
> "It's not our intent to license anything again," Ms. Sunseri said. She said that after Lederle paid a small up-front fee for the right to sell Maxzide® and oversaw a promising launch, the drug languished while Lederle's sales force pushed other products.

Cowan, *Wall Street: Did the Short-Sellers Stumble?*, N.Y. TIMES, Aug. 19, 1990, § 3, at 14, Col. 3. Amended Answer and Counterclaims at p. 33.

Moreover, Cyanamid relates that the false statements by McKnight and Sunseri about the placement of orders for Maxzide® were just part of a "prolonged, broadside attack on Cyanamid's marketing competence". An article in the November 26, 1990 edition of the Pittsburgh Business Times & Journal described Mylan's business successes and then reported:

> "But less encouraging for Mylan has been its experience with Maxzide® . . . . McKnight is not pleased with Lederle's performance, and he issued a strong warning."

Marano, *Prescription for Success: Mylan Battles FDA, Market Forces to Succeed in Volatile Industry,* PITT. BUS. TIMES & J., Nov. 26, 1990, § 3, at 9.

The newspaper then reported the following statement by McKnight:

> Lederle's sales and efforts have been a great disappointment to us. Lederle literally is not living up to their contract, and if they don't straighten up their act, then we'll take whatever steps have to be done to change that.

Cyanamid contends that the above statements by McKnight and Sunseri, made as officers of Mylan, and identified at paragraphs 126 through 136 of Cyanamid's third counterclaim, were "intended to disparage Cyanamid, and in fact, damaged its business reputation because they falsely portrayed its Lederle Division as being incompetent, negligent, or otherwise unfit as a marketer and distributor of pharmaceutical products or as a business partner." Amended Answer and Counterclaims at pages 33 and 34. Cyanamid amplifies these charges in its statements made a part of the pretrial order by stating:

> The false assertion that Cyanamid had ceased placing orders carries with it the direct claim that Cyanamid has breached or reneged on its contractual obligations. Moreover, that false statement, as well as the others set forth above, strongly imply that Cyanamid is not actively promoting Maxzide® in the marketplace and in fact may be abandoning it, thereby signifying a lack of confidence in the drug itself. This type of publicity can have a demoralizing effect on the Cyanamid sales force. Such statements create the impression in the minds of prescribing physicians, distributors, wholesalers and pharmacies that—Maxzide® may not be as good as or as widely used as they previously thought. The dynamics of the marketplace are such that, as a result, prescriptions will decline, inventories will shrink and sales opportunities

> will be lost. More importantly, such statements, carrying with them the message that Cyanamid is an unreliable or incompetent business colleague, are likely to have a direct adverse effect upon Cyanamid's ability to enter into agreements or form associations with other firms. As a result of those defamatory statements, Cyanamid is entitled to recover compensatory and punitive damages.

Pre-Trial Order at p. 45.

In order to properly address the question of whether Mylan and McKnight are entitled to summary judgment, this Court must first analyze and then determine in light of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) whether Cyanamid is a public or private figure.

New York Times v. Sullivan which gave constitutional dimension to the American law of defamation, held that actions by public officials must be supported by "actual malice", a constitutional term of art defined as publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."

Professor Smolla in his treatise cited by Mylan, McKnight and Cyanamid notes that "[m]ost of the framework for the modern law of defamation estimates from *Gertz v. Robert Welsh, Inc.* which established the principal dichotomy of contemporary defamation law, the distinction between public official and public figure plaintiffs on the one hand, and private figure plaintiffs on the other." RODNEY A. SMOLLA, *Law of Defamation* § 1.05[3] at 1-14.

Gertz reaffirmed *New York Times*, and several cases following that decision, in deciding that actual malice was required for public figures and public officials. *Gertz* divides public figures into two categories, "limited" (or "vortex") public figures and "universal" (or "unlimited" or "pervasive") public figures. The term "limited" public figure has been refined in later cases. *Times. Inc. v. Firestone*, 424 U.S. 448 (1976), *Wolston v. Readers Digest Association, Inc.*, 443 U.S.

157 (1979) and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), SMOLLA § 2.07, 2.08 at 2-22 to 2-29.

The determination of whether a defamation plaintiff is a public or private figure is ultimately one of law. *Fitzgerald v. Penthouse Int'l., Ltd.*, 691 F.2d 666, 669-70 (4th Cir. 1982).

As Smolla notes: "Virtually all the approaches adopted by lower courts to define "public figure" status involve two basic subcomponents:

(1) A 'public controversy' of some kind must exist.

(2) There must be 'involvement' by the plaintiff in that 'public controversy' ". SMOLLA § 2.09[2] at 2-30.

Several appellate courts have adopted multi-factor tests. The Fourth Circuit in *Fitzgerald v. Penthouse International, Ltd.*, 525 F. Supp. 585 (D. Md. 1981), *aff'd in part and rev'd in part*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983), adopted a five factor test set forth by the district court. In it, the Court must assess:

(1) the plaintiff's access to effective channels of communication;

(2) the extent to which the plaintiff voluntarily assumed the role of special prominence in regard to public controversy;

(3) the extent to which the plaintiff sought to influence the outcome of the controversy;

(4) whether the controversy predated the publication of the allegedly defamatory communication; and

(5) whether the plaintiff's public figure status was retained at the time of the publication.

The Second Circuit in *Lerman v. Flynt Distributing Company*, 745 F.2d 123 (2nd Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) has laid down a four point test in which the defendant must prove that the plaintiff has:

(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of the litigation;

(2) voluntarily injected himself into a public controversy related to the subject of the litigation;

(3) assumed a position of prominence in the public controversy; and

(4) maintained regular and continuing access to the media.

While both Mylan and Cyanamid have at different times argued that the law of the place of the wrong (i.e. Second Circuit) should apply, this court believes that the Second Circuit approach and the approach of the law of the forum (Fourth Circuit) are substantially similar and in this case would yield the same result.

Of course, not all factors will be relevant in every case. One important factor cited in *Gertz* is "access to the media" because public figures are more likely to have effective opportunities for self-help when defamed. Since, generally, public figures enjoy significantly greater access to channels of effective communication, the Court in *Gertz* assessed that they have, as a class a more realistic opportunity to contradict the lie or correct the error than do private individuals. SMOLLA § 2.05, at 2-21 to 222. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344. Here, Cyanamid a large public corporation with considerable access to the general and financial media, including through its prestigious pharmaceutical division, Lederle, the media involved in covering the pharmaceutical industry, could certainly have countered and corrected any false statements by McKnight or Sunseri with regard to Cyanamid's orders of Maxzide® products or the filing of the lawsuit by Mylan.

However, there is nothing in the record that Cyanamid made, or even attempted to make, any rebuttal. It neither requested a retraction or correction of the statements or

sought to respond to the newsletter and newspaper articles in later issues. Instead, it filed this counterclaim. *See Reuben v. Food Chemical News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991).

Cases dealing with whether a defamation plaintiff is a public figure have stressed that the plaintiff must have voluntarily injected himself into the public controversy. However, this general point is well-addressed by Smolla in his treatise:

> Plaintiffs sometimes advance the argument that they cannot properly be classified as public figures because they did not "voluntarily" invite media attention, even though they may have voluntarily engaged in the activity out of which the media attention arose. Based on a popular misconception surrounding the public figure issue, this is an altogether spurious defense. Of course many plaintiffs find media attention undesirable, particularly unflattering attention, and do not volunteer for it. But just as the media is not permitted to bootstrap itself into creating its own defense by focusing attention on the plaintiff through the very speech alleged to be defamatory, the plaintiff is not permitted to avoid the strictures of the actual malice standard by protesting, "I didn't want the attention." The proper question is not whether the plaintiff volunteered for the publicity but whether the plaintiff volunteered for an activity out of which publicity would foreseeably arise. [Footnotes omitted]

SMOLLA § 2.13[2].

As the Fourth Circuit stated in *Reuben v. Food Chemical News, Inc.*, 925 F.2d at 709 (4th Cir. 1991): "[E]ven "involuntary" participants can be public figures when they choose a course of conduct which invites public attention", citing *Clyburn v. New World Communications, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990); *McDowell v. Paiewonsky*, 769 F.2d 942, 949-50 (3d Cir. 1985).

When a defamation plaintiff (or in this case, a counterclaimant) is a corporation, as is Cyanamid, some special

problems arise in determining whether to classify that corporation as a public or private figure, including the fact that corporations are deemed to be fictional legal entities who could be said to have no "reputational interest" or "feelings"; that an issue of business conduct or "commercial speech" exists; and that corporations are often "pervasively visible and powerful economic, political and social forces in American life". SMOLLA § 2.24[1] at 2-81 to 2-82. It appears that the Supreme Court has not yet dealt with the application of the public figure test in a corporate plaintiff setting. SMOLLA § 2.24[6] at 2-86. However, district courts have held that the plaintiff corporation was a public figure in *Bose Corporation v. Consumers Union of the United States, Inc.*, 508 F. Supp. 1249, 1274 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982) *aff'd*, 104 S. Ct. 1949 (1984) and in *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977).

In this case, there is no question that Cyanamid, a large publically traded international corporation, volunteered for an activity out of which publicity was generated through the comments made by McKnight and Sunseri. It willingly and for well-understood business purposes entered into the marketing agreements with Mylan, which dealt with an important drug for the treatment of hypertension, one which both Cyanamid and Mylan hoped and expected would displace a rival company's drug, Dyazide®, thus generating large profits for both Mylan and Cyanamid. As Cyanamid put it, Mylan needed the "expertise and resources of a company accustomed to marketing branded pharmaceutical products in order to market the new drug effectively". Pre-Trial Order (Defendants' Statement of Facts to be Proved at Trial) at p. 15. Following the public announcement of the marketing arrangement for Maxzide®, Cyanamid proceeded a "launch" of Maxzide® which was of "virtually unprecedented intensity, using a broad spectrum of media to create product awareness and name recognition quickly, and more importantly, to educate the medical community as to the pharmacological

features of the new drug. The launch also included intense selling efforts aimed at drug wholesalers and retailers to insure well-stocked pharmacy shelves ready to fill the prescriptions written as a result of Cyanamid's promotional efforts. After the launch, Cyanamid sustained aggressive marketing and promotional efforts, using a variety of techniques to maintain a high level of awareness of Maxzide® among prescribing physicians." Pre-Trial Order (Defendants' Statement of Facts to be Proved at Trial) at p. 20.

Maxzide® is, according to Cyanamid, a commercial success, prescribed by tens of thousands of doctors for use by hundreds of thousands of patients, described in textbooks used at medical and pharmacy schools, as well as drug evaluations published by the American Medical Association and other institutions. Certainly, Cyanamid's involvement with this major drug in a highly competitive and regulated industry would lead it to foresee the activity out of which the alleged defamatory statements would occur. Consequently, this Court believes that Cyanamid's argument that Mylan by filing this lawsuit is merely attempting to "bootstrap" Cyanamid into a public figure category is without merit.

This Court therefore finds that Cyanamid in the context of the third counterclaim is a limited public figure.

In order to recover compensatory damages for defamation, a public figure must show actual malice with convincing clarity, *New York Times*, 376 U.S. at 285-286. To recover punitive damages for defamation related to a matter of public concern, any party regardless of status must show actual malice under a clear and convincing evidence standard. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990).

The actual malice standard has been best clarified in *St. Amant v. Thompson*, 390 U.S. 727 (1968) an aftermath of the *New York Times* definition that a statement is made with "actual malice" when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not". *New York Times*, 376 U.S. at 280. In *St. Amant*, the Court held that "reckless conduct is not measured by whether

a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant*, 390 U.S. at 731.

The actual malice standard is not an objective standard but a subjective one in which the state of mind is in issue, although there may be settings in which the alleged defamatory statements may themselves be evidence as to the state of mind of the defendant. *St. Amant*, 390 U.S. at 732.

This Court finds, from the record in this case, that there is insufficient evidence presented with convincing clarity that the statements made by McKnight or Sunseri were made with actual malice as defined above. There is no evidence that McKnight knew his statements regarding Cyanamid's orders were false and assuming that Sunseri's statements were false, there is no evidence that she knew that they were false. Further, in this Court's opinion, there is insufficient evidence that the conduct of McKnight or Sunseri was "reckless" under the actual malice standard.

Accordingly, this Court finds, viewing the evidence in the light most favorable to Cyanamid, that there is insufficient proof presented with convincing clarity that Mylan, through McKnight and Sunseri, acted with actual malice and that, therefore, there is no genuine issue of material fact since the evidence is insufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Therefore, the motion for summary judgment of Mylan and McKnight against Cyanamid on its amended counterclaim for defamation must be Granted.

VIII. Conclusion

For the reasons stated above, the motion of American Cyanamid Company for summary judgment as to Count I of

the Amended Complaint is GRANTED; the motion of American Cyanamid Company for judgment on the pleadings as to Count V of the Amended Complaint is GRANTED; the motion of Mylan Pharmaceuticals, Inc. as to Count I of the counterclaim of American Cyanamid Company is DENIED; and the motion of Mylan Pharmaceuticals, Inc. and Roy McKnight for summary judgment as to Count III of the counterclaim of American Cyanamid Company is GRANTED.

IT IS SO ORDERED.

The Clerk is directed to transmit certified copies of this Memorandum Opinion and Order to counsel of record herein.

ENTERED: July 27, 1993

/s/ FREDERICK P. STAMP, JR.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: Dr. Wally Edgell
Clerk, U. S. District Court
Northern District of West Virginia

by: /s/ [ILLEGIBLE]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 90-0121-C(S)
Filed: July 27, 1993

MYLAN PHARMACEUTICALS, INC.,
a West Virginia corporation,

Plaintiff and Counterclaim Defendant,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Defendant and Counterclaimant,

—v.—

ROY MCKNIGHT,

Third-Party Counterclaim Defendant.

JUDGMENT

For the reasons stated in this Court's MEMORANDUM OPINION AND ORDER RESOLVING MOTIONS FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS entered on this date, the motion of American Cyanamid Company for summary judgment as to Count I of the Amended Complaint, the motion of American Cyanamid Company for judgment on the pleadings as to Count V of the

Amended Complaint and the motion of Mylan Pharmaceuticals, Inc. and Roy McKnight for summary judgment as to Count III of the counterclaim of American Cyanamid Company are GRANTED.

Counts I and V of the Amended Complaint of Mylan Pharmaceuticals, Inc. are DISMISSED and Count III of the counterclaim of American Cyanamid Company is DISMISSED.

The Clerk is directed to transmit certified copies of this judgment to counsel of record herein.

ENTERED: July 27, 1993

/s/ FREDERICK P. STAMP, JR.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: Dr. Wally Edgell
Clerk, U. S. District Court
Northern District of West Virginia

By: /s/ [ILLEGIBLE]
Deputy Clerk

United States Constitution

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.